THE GENERAL STATUTES OF NORTH CAROLINA

1985 SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 2A, Part II

Chapters 41A to 52A

1984 Replacement

Annotated through 329 S.E.2d 896. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Supplement to Replacement Volume 2A, Part II contains the general laws of a permanent nature enacted by the General Assembly at the 1985 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly at the 1985 Regular Session affecting Chapters 41A through 52A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 313, p. 337.
North Carolina Court of Appeals Reports through Volume 73, p. 335.
South Eastern Reporter 2nd Series through Volume 329, p. 896.
Federal Reporter 2nd Series through Volume 761, p. 712.
Federal Supplement through Volume 607, p. 1490.
Federal Rules Decisions through Volume 105, p. 250.
Bankruptcy Reports through Volume 48, p. 873.
Supreme Court Reporter through Volume 105, p. 2370.
North Carolina Law Review through Volume 63, p. 809.
Wake Forest Law Review through Volume 20, p. 540.
Campbell Law Review through Volume 7, p. 298.
Duke Law Journal through 1983, p. 1142.
North Carolina Central Law Journal through Volume 14, p. 680.
Opinions of the Attorney General.

The General Statutes of North Carolina
1985 Supplement

VOLUME 2A, PART II

Chapter 41A.
State Fair Housing Act.

§ 41A-6. Exemptions.

The provisions of G.S. 41A-4 do not apply to the following:

(2) The rental of a room or rooms in a private house, not a boarding house, if the lessor or a member of his family resides in the house;

(6) Any person, otherwise subject to its provisions, who adopts and carries out a plan to eliminate present effects of past discriminatory practices or to assure equal opportunity in real estate transactions, if the plan is part of a conciliation agreement entered into by that person under the provisions of this Chapter or under the provisions of the Federal Fair Housing Act, 42 U.S.C. § 3601 et seq. or is voluntary and is consistent with the purposes thereof;

(7) The sale, rental, exchange, or lease of commercial real estate. For the purposes of this Chapter, commercial real estate means real property which is not intended for residential use. (1983, c. 522, s. 1; 1985, c. 371, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "in a private house, not a boarding house, if the lessor or a member of his family resides in the house" for "in a house by an individual if he or a member of his family resides therein" at the end of subdivision (2), substituted a semicolon for a period at the end of subdivision (6), and added subdivision (7).

§ 41A-7. Enforcement.

(a) Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Council. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Council requires. Council employees shall assist complainants in reducing complaints to writing and shall assist in

setting forth the information in the complaint as may be required by the Council. Within 10 days after receipt of the complaint, the Director of the Council shall furnish a copy of the complaint to the person who allegedly committed or is about to commit the unlawful discriminatory housing practice.

(d) Complaints may be resolved at any time by informal conference, conciliation, or persuasion. Nothing said or done in the course of such informal procedure may be made public by the Council or used as evidence in a subsequent proceeding under this Chapter without the written consent of the person concerned.

(e) Upon receipt of a complaint, the Council shall investigate the complaint to ascertain the facts relating to the alleged unlawful discriminatory housing practice. If the complaint is not resolved before the investigation is complete, upon completion of the investigation, the Council shall determine whether or not there are reasonable grounds to believe that an unlawful discriminatory housing practice has occurred. The Council shall make a determination within 90 days after receiving the complaint, unless the Council determines that good cause exists for further delay.

(f) If the Council finds no reasonable ground to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall dismiss the complaint and issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court.

(g) If the Council finds reasonable grounds to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall proceed to try to eliminate or correct the discriminatory housing practice by informal conference, conciliation, or persuasion.

(h) If the Council is unable to resolve the alleged unlawful discriminatory housing practice it may declare that conciliation efforts have failed. Upon making such a declaration, the Council may:

(1) Dismiss the complaint and issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court; or

(2) Commence a civil action in superior court against the respondent for such preventive relief as it deems necessary to enforce the provisions of this Chapter. In such an action, the Council shall be represented by an attorney employed by the Council and G.S. 114-2 shall not apply.

(i) If after 130 days after a complaint has been filed the Council has failed to resolve the complaint or issue a right-to-sue letter, the Council shall, upon written request of the complainant, issue a right-to-sue letter to the complainant. Issuance of a letter under this subsection shall not prevent the Council from commencing a civil action under subsection (h)(2) of this section which action shall be consolidated with any action filed by the complainant.

(j) The court may grant relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff, actual and punitive damages, and may award court costs, and reasonable attorney's fees to the prevailing party, other than a State agency or commission; Provided, however, That a prevailing respondent may be awarded court costs and reasonable attorney's fees only upon a showing that the case is frivolous, unreasonable, or without foundation. (1983, c. 522, s. 1; 1985, c. 371, ss. 3-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote subsections (a) and (d), designated former subsection (e) as subsection (j) and added new subsections (e) through (i).

§ 41A-9. Statute of limitation.

A civil action brought pursuant to this Chapter shall be commenced within 180 days after the filing of a complaint with the Council. (1983, c. 522, s. 1; 1985, c. 371, s. 6.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "after the filing of a complaint with the Council" for "from the date of issuance of the right-to-sue letter, or the expiration of 180 days from the filing of a complaint with the Council whichever occurs first."

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

Legal Periodicals. —
For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.

CASE NOTES

Cited in Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.

CASE NOTES

Quoted in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.

CASE NOTES

When title passes, the lessee ceases to hold under the grantor and he becomes a tenant of the grantee. In other words, privity is automatically established between the lessor's grantee and the lessee. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

The general rule is that the rights and liabilities existing between the grantee and lessee are the same as those existing between the grantor and the lessee, after the lessee is given notice of the transfer of the property. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

§ 42-14. Notice to quit in certain tenancies.

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least 30 days before the end of the current rental period, regardless of the term of the tenancy. (1868-9, c. 156, s. 9; Code, s. 1750; 1891, c. 227; Rev., s. 1984; C.S., s. 2354; 1985, c. 541.)

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, and applicable to leases entered into after that date, added the last sentence.

Article 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (1876-7, c. 283; Code, s. 1754; Rev., s. 1993; 1917, c. 134; C.S., s. 2355; 1933, c. 219; 1985, c. 689, s. 11.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, deleted the last sentence of the first paragraph, which read: "A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the Article Agricultural Liens, in the Chapter Liens."

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

Where lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, the landlord or his assigns shall have a lien on all the insurance procured by the tenant or cropper on the crops raised on the lands leased or rented to the extent of any rents due or advances made to the tenant or cropper.

The lien provided herein shall be preferred to all other liens on said insurance, and the landlord or his assigns shall be entitled to all the remedies at law for the enforcement of the lien. (1959, c. 1291; 1985, c. 689, s. 12.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, deleted the second paragraph, which read: "To be entitled to the benefit of the lien herein provided, the landlord must conform as to prices charged for advances under the provisions of Article 10 of Chapter 44 relating to agricultural liens."

Article 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

CASE NOTES

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to §§ 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

§ 42-25.9. Remedies.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 44A-2(e) or 42-25.9(d), the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S. 42-36.2 or G.S. 44A-2(e), deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, inserted "or 42-25.9(d)" in subsection (b) and added new subsections (d), (e) and (f).

CASE NOTES

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to §§ 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

Article 3.

Summary Ejectment.

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 10 days from the issuance of the summons to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed one thousand five hundred dollars ($1,500), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1.)

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, substituted "one thousand five hundred dollars ($1,500)" for "one thousand dollars ($1,000)" near the middle of the second sentence.

Legal Periodicals. —

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant at his last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful, the officer shall make at least one visit to the place of abode of the defendant at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer

shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102.)

Effect of Amendments. — The 1985 amendment, effective April 18, 1985, substituted "The officer may attempt" for "The officer shall attempt" at the beginning of the second sentence and substituted "If the officer does not attempt to telephone the defendant or the attempt" for "If a telephone call is not possible or" at the beginning of the third sentence.

§ 42-30. Judgment by confession or where plaintiff has proved case.

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence, or the defendant admits the allegations of the complaint, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding one thousand five hundred dollars ($1,500), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C.S., s. 2369; 1971, c. 533, s. 5; 1973, c. 10; c. 1267, s. 4; 1979, c. 144, s. 5; 1981, c. 555, s. 5; 1985, c. 329, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "one thousand five hundred dollars ($1,500)" for "one thousand dollars ($1,000)" near the middle of the section.

§ 42-31. Trial by magistrate.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

§ 42-34. Undertaking on appeal and order staying execution.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

§ 42-36.1. Lease or rental of manufactured homes.

The provisions of this Article shall apply to the lease or rental of manufactured homes, as defined in G.S. 143-145. (1971, c. 764; 1985, c. 487, s. 8.)

Effect of Amendments. — The 1985 amendment, effective June 27, 1985, changed the catchline and substituted "manufactured homes" for "mobile homes."

Article 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

CASE NOTES

Violation of a provision for immediate eviction if utilities were discontinued because of nonpayment was a material noncompliance with the lease and authorized the housing authority to proceed in summary ejectment. Maxton Hous. Auth. v. McLean, 70 N.C. App. 550, 320 S.E.2d 322, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

Cited in Sides v. Duke Hosp., — N.C. App. —, 328 S.E.2d 818 (1985).

Article 5.

Residential Rental Agreements.

§ 42-42. Landlord to provide fit premises.

CASE NOTES

Violation as Evidence, etc. — Violations of this section are evidence of negligence. Jackson v. Housing Auth., — N.C. App. —, 326 S.E.2d 295 (1985).

§ 42-44. General remedies and limitations.

CASE NOTES

Applied in Jackson v. Housing Auth., — N.C. App. —, 326 S.E.2d 295 (1985).

Article 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

CASE NOTES

Defendants' unequivocal admission in their answer that they did "accept a security deposit" constituted a judicial admission conclusively establishing the fact, despite defendants' contention that the deposit was not a security deposit, but was simply to "hold the house." Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

§ 42-51. Permitted uses of the deposit.

CASE NOTES

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Chowan, Cleveland, Columbus, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9.)

Effect of Amendments. — The 1985 amendment, effective February 25, 1985, inserted the reference to Alexander County.

Article 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Recovery on Federal Loan Program. — While an action brought by the United States to recover damages for conversion of property is governed by the six-year statute of limitations contained in 28 U.S.C. § 2415(b), and not by similar statutes provided by state law, this section specifically controls the legal duration of an agricultural lien upon soybeans under state substantive law and is not a statute of limitations. Actions to recover on federal loan programs are controlled by federal common law and state law is adopted as the federal common law unless it is found to be discriminatory. In this regard, this section is far from discriminatory and provides an effective mechanism for resolution of disputes concerning perishable, agricultural commodities. United States v. Bailey Feed Mill, Inc., 592 F. Supp. 844 (E.D.N.C. 1984).

§ 44-69.3. Liens on tangible and intangible assets of milk distributors.

(a) A producer, or an association of producers who supplies milk either through an agreement of sale or on consignment to a distributor shall, upon complying with the provisions of this section, have a lien upon the tangible and intangible assets, including but not limited to the accounts receivable of the distributor to secure payment for such milk. For purposes of this section the term "milk" is as defined in Article 28B of Chapter 106 of the General Statutes.

(b) The lien claimed by the producer or association of producers must be filed in the office of the clerk of court for the county of the distributor's principal place of business. Provided that if the distributor is not a resident of the State a filing must be made with the clerk of superior court for the county in which the distributor's registered office is located. The clerk shall note the claim of lien on the judgment docket and index the same under the name of the distributor at the time the claim is filed.

(c) A producer or association of producers claiming nonpayment for milk sold to a distributor shall file with the clerk a notarized statement of nonpayment. The statement shall contain at a minimum the following information:

(1) The name of the distributor who received the milk;
(2) The date and quantity of milk shipped for which payment has not been received; and
(3) A statement from the North Carolina Milk Commission certifying the amount due from the distributor, and the date payment was due.

The producer or association of producers shall furnish a copy of the statement as provided by this subsection to the distributor, which shall constitute a notice of claim of lien. The notice shall be served personally by a person authorized by law to serve process or by certified mail. The lien granted by this section shall be effective as of the time it is filed with the clerk of court. Provided the distrib-

utor shall have the right to contest the validity of such lien by filing, with the clerk of court and serving on the producer within 10 days after he receives notice that the producer has filed a claim of lien, a notice that the distributor contest the amount due thereunder. In the event the distributor fails to contest the lien or is unsuccessful in obtaining a discharge of the lien, the lien shall be perfected as of the date of filing with the clerk of court.

(d) The lien created by this section may be discharged in any of the following manner:

(1) By filing with the clerk of superior court a receipt of acknowledgment signed by the chairman of the North Carolina Milk Commission or his designee, that the lien has been discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the producer; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed or a judgment has been rendered against the claimant in such action.

(4) By filing with the clerk a sworn statement signed by the producer or an official of an association of producers that the lien or claim of lien has been satisfied.

(e) Action to enforce the lien created by this section may be instituted in any court of competent jurisdiction in the county where the lien was filed not later than 90 days following the maturity of the distributor's obligation to pay for the milk. In the event no action to enforce the lien is commenced within the 90-day period the lien created hereby shall no longer be valid. Nothing herein shall prohibit the North Carolina Milk Commission from acting as a mediator or an arbitrator between the distributor and producer or association of producers when there is a claim of nonpayment at any time before or after claim of lien is filed but before a judgment is rendered. (1985, c. 678, s. 1.)

Editor's Note. — Session Laws 1985, c. 678, s. 2 makes this section effective October 1, 1985.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

CASE NOTES

Applied in Drummond v. Cordell, — N.C. App. —, 324 S.E.2d 301 (1985).

§ 44A-4. Enforcement of lien.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as

the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of four dollars ($4.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, the lienor may institute a special proceeding in the court where the vehicle is being held, for authorization to sell that vehicle. In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State and be paid immediately to the treasurer for disposition pursuant to Chapter 116B of the General Statutes. A vehicle owner or possessor claiming an interest in such proceeds shall have a right of action under G.S. 116B-38.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person the Division has mailed notice to previously. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that two or more bona fide bids on the vehicle were received, the names, addresses and bids of the bidders, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-399.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to

notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 655, s. 6 provides: "The Administrative Office of the Courts with the advice and assistance of the Attorney General shall prepare forms appropriate and necessary to meet the purposes of this act."

Effect of Amendments. —

The 1985 amendment, effective January 1, 1986, deleted "or posts bond for double such amount" following "court in which such action is pending" in the second sentence of the second paragraph of subsection (a), added the last five sentences of that paragraph, and added the last three paragraphs of subdivision (b)(1).

CASE NOTES

Applied in Drummond v. Cordell, — N.C. App. —, 324 S.E.2d 301 (1985); Drummond v. Cordell, — N.C. App. —, 326 S.E.2d 292 (1985).

§ 44A-5. Proceeds of sale.

CASE NOTES

Stated in Drummond v. Cordell, — N.C. App. —, 326 S.E.2d 292 (1985).

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or

skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes.

(1969, c. 1112, s. 1; 1975, c. 715, s. 1; 1985, c. 689, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "Chapter 83A, 89A or 89C" for "Chapter 83, 89 or 89A" at the end of subdivision (1).

CASE NOTES

Act Is Remedial in Nature. — The materialman's lien act, Chapter 44A, Article 2, Part 1, is remedial in nature and should be construed to advance the legislative intent in enacting it. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the meaning of this section, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

CASE NOTES

Purpose. — The purpose of the materialman's lien statute is to protect the interest of the supplier in the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value. To implement this purpose, courts should construe the statute so as to further the legislature's intent. They should construe a remedial statute to advance the remedy intended. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

Priority over Purchase Money Deed of Trust. — Where plaintiff had a contract with the owner of the property within the meaning and intent of those terms as used in this section, materials furnished pursuant to that contract gave rise to a statutory materialman's lien which takes precedence over a purchase money deed of trust when there is an intervening construction loan deed of trust. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the meaning of § 44A-7, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

Agreement to Arbitrate Did Not Bar Plaintiff from Statutory Remedy. — Claim of lien, included within complaint of plaintiff, a registered professional engineer, for breach of contract, and filed pursuant to this section, constituted a statutory remedy that was not extinguished merely because plaintiff had entered into a contract providing for arbitration; plaintiff was not foreclosed from pursuing his statutory remedy by agreeing to arbitrate. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Applied in Mauney v. Morris, — N.C. App. —, 327 S.E.2d 248 (1985).

§ 44A-10. Effective date of liens.

CASE NOTES

Priority of Purchase Money Deed of Trust under Doctrine of Instantaneous Seisin. — A materialman's lien relates back and takes effect from the time of the first furnishing of materials at the site of the improvement by the person claiming the lien. While the statutory language does not indicate the precise moment of attachment, it does indicate an order of priority between competing lien claimants. That priority can be defeated by the application of the doctrine of instantaneous seisin. Such doctrine provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. It would thus subordinate a previously existing materialman's lien. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

Policy supporting the doctrine of instantaneous seisin is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

No Priority Where Holder Gives Construction Lender Priority over Own Interest. — Since the vendor and the construction lender have the resources and the bargaining power to require the vendee to obtain lien waivers from material suppliers or to obtain title insurance, the court can perceive no reason to extend the doctrine of instantaneous seisin to protect, at the expense of the materialman, the holder of a purchase money security interest who, by consenting to give a construction lender's security an intervening priority over his or her own, has indicated an intent not to be so protected. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., — N.C. App. —, 324 S.E.2d 626 (1985).

§ 44A-12. Filing claim of lien.

CASE NOTES

Applied in Mauney v. Morris, — N.C. App. —, 327 S.E.2d 248 (1985).

§ 44A-13. Action to enforce lien.

CASE NOTES

Motion to Amend Made More Than 180 Days after Last Furnishing of Labor or Materials. — It was not error to deny plaintiff's motion to amend his complaint so as to state a new cause of action for a materialmens' or laborers' lien, where more than 180 days had passed after the last furnishing of labor or materials as of the date of the motion, since the amendment would not relate back to the date of the original complaint. Mauney v. Morris, — N.C. App. —, 327 S.E.2d 248 (1985).

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.

CASE NOTES

Cited in Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

Upon compliance with this Article:

(6) A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23. (1971, c. 880, s. 1; 1985, c. 702, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, rewrote subdivision (6), which read: "The liens granted under this section are perfected upon the giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by obligor."

§ 44A-19. Notice to obligor.

(d) Notices under this section shall be served upon the obligor in person or by certified mail in any manner authorized by the North Carolina Rules of Civil Procedure. A copy of the notice shall be attached to any claim of lien filed pursuant to G.S. 44A-20(d). (1971, c. 880, s. 1; 1985, c. 702, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, added subsection (d).

§ 44A-20. Duties and liability of obligor.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a lien upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b), which lien shall be enforced only in the manner set forth in G.S. 44A-7 through 44A-16 and which lien shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the con-

tractor. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. The claim of lien shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under subsection (b). (1971, c. 880, s. 1; 1985, c. 702, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, added the last two sentences of subsection (d).

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.

A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent. (1971, c. 880, s. 1; 1985, c. 702, s. 4.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, inserted the present third sentence.

Article 3.

Model Payment and Performance Bond.

§ 44A-28. Actions on payment bonds; venue and limitations.

CASE NOTES

Applied in Mid-South Constr. Co. v. Wilson, 71 N.C. App. 445, 322 S.E.2d 418 (1984).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2.

Right to Foreclose or Sell under Power.

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2; 1975, c. 66; 1985, c. 320; c. 689, s. 14.)

Effect of Amendments. — Session Laws 1985, c. 320, s. 1, effective October 1, 1985, rewrote this section.

Session Laws 1985, c. 689, s. 14, effective July 11, 1985, substituted "this subsection" for "this section" in the last paragraph of subsection (a) of this section as it read prior to the amendment by Session Laws 1985, c. 320, s. 1. The section is set out as amended by c. 320.

§ 45-20.1. Validation of trustees' deeds where seals omitted.

All deeds executed prior to April 1, 1985, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature are validated. (1943, c. 171; 1981, c. 183, s. 1; 1983, c. 398, s. 1; 1985, c. 70, s. 1.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.

CASE NOTES

Two methods of foreclosure are possible in North Carolina: Foreclosure by action and foreclosure by power of sale. Phil Mechanic Constr. Co. v. Haywood, —. N.C. App. —, 325 S.E.2d 1 (1985).

Foreclosure pursuant to a power of sale is strictly regulated by this Article which requires a hearing before the clerk of superior court to determine four issues. If the clerk determines the existence of each item, the clerk then authorizes the trustee to proceed with the sale pursuant to the power of sale contained in the mortgage instrument itself. This procedure enables the trustee or mortgagee to conduct the foreclosure sale with a level of judicial involvement somewhat less than that required in a foreclosure by action. If the mortgage contains a power of sale, the mortgagee or trustee may elect to proceed under this Article or may choose to proceed under foreclosure by action. Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

Proceedings under Article Are Special Proceedings. — Since rights sought to be enforced under this Article are instituted by filing notice instead of a complaint and summons and are prosecuted without regular pleadings, they are properly characterized as "special proceedings." Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

Order Construing Validity of Debt and Right to Foreclose May Be Res Judicata. — An order entered by the clerk of superior court construing the validity of the debt and the trustee's right to foreclose, pursuant to this Article may be res judicata as to a subsequent action based on the issues decided in the clerk's order. Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culmi-

nating in a judicial sale of the foreclosed property if the mortgagee prevails. Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

This Article does not apply to or prevent bringing of foreclosure by action. However, when a mortgagee or trustee elects to proceed under § 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are res judicata and cannot be relitigated in an action for strict judicial foreclosure. Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

§ 45-21.2. Article not applicable to foreclosure by court action.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When the same property secures two or more mortgages or deeds of trust held by the same person, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1.)

Editor's Note. — Session Laws 1985, c. 515, s. 2 makes this section effective July 1, 1985, and applicable to sales conducted on or after that date.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

CASE NOTES

Foreclosure under Original Deed of Trust Where Second Deed of Trust Invalid. — Where second deed of trust was given by respondents as security for second loan, which was used to pay off first loan, the parties intending the second note and deed of trust to replace and be substituted for the original note and deed of trust, but failure of the respondents to affix the proper signatures to the second deed of trust caused it to be invalid and amounted to substantial failure of consideration for the second loan agreement, the second loan agreement was rendered a nullity, and the parties' duties under the original loan

agreement were revived. Thus, where respondents were in default under the original debt petitioner had a right to foreclose under the original deed of trust. Bowers v. Bowers, — N.C. App. —, 329 S.E.2d 725 (1985).

Applied in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985); In re Johnson, — N.C. App. —, 325 S.E.2d 502 (1985).

Cited in Hofler v. Hill, 311 N.C. 325, 317 S.E.2d 670 (1984).

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(1) Notice of sale of real property shall

a. Be posted, at the courthouse door in the county in which the property is situated, for at least 15 days immediately preceding the sale.

b. And in addition thereto,

1. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.

3. In addition to the newspaper advertisement under 1 or 2 above, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 567, s. 3 provides that nothing in the act shall affect pending litigation.

Effect of Amendments. — The 1985 amendment, effective July 2, 1985, substituted "for at least 15 days" for "for 20 days" in paragraph (1)a.

§ 45-21.26. Preliminary report of sale of real property.

CASE NOTES

Applied in In re Miller, — N.C. App. —, 325 S.E.2d 490 (1985).

§ 45-21.27. Upset bid on real property; compliance bonds.

CASE NOTES

Power of a clerk to set aside his initial approval is inherent in subsection (b) of this section, and is also authorized by § 45-21.29(j). In re Miller, — N.C. App. —, 325 S.E.2d 490 (1985).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

CASE NOTES

Power of a clerk to set aside his initial approval is inherent in § 45-21.27(b), and is also authorized by subsection (j) of this section. In re Miller, — N.C. App. —, 325 S.E.2d 490 (1985).

Article 2B.

Injunctions; Deficiency Judgments.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

This section is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contracts with the mortgagors. Northwestern Bank v. Weston, — N.C. App. —, 325 S.E.2d 694 (1985).

Section Applies to Mortgagee Who Holds Obligation Securing Property for Sale. — This section does not say that it applies to any mortgagee or to a mortgagee who holds an obligation secured by the property for sale. Rather, it applies to the mortgagee, payee or other holder, who holds the obligation thereby secured, i.e., the obligation secured by the property for sale, and under which the sale is held. Northwestern Bank v. Weston, — N.C. App. —, 325 S.E.2d 694 (1985).

A deficiency judgment is an imposition of personal liability on the mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

Legislative Intent. —

At foreclosure, the holder of a purchase money mortgage or deed of trust is limited to the recovery of the security or to the proceeds from the sale of the security. The holder is prohibited from ignoring his security and bringing an in personam action against the mortgagor on the note secured by the deed of trust. The holder is, also, prohibited from

bringing an in personam suit after foreclosure to recover a deficiency. In fact, the State Supreme Court has stated, unequivocally, that the manifest intention of the Legislature in codifying this section was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

A deficiency judgment is an imposition of personal liability on a mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

This section does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by a holder of a first purchase money mortgage or deed of trust. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

This section does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Notwithstanding the anti-deficiency statute, a creditor could sue on the purchase money note he held where he had lost the opportunity to foreclose due to an earlier foreclosure by another creditor. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

The anti-deficiency statute does not apply to actions by unsecured creditors. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

Obligations under Notes and Deeds of Trust as "Antecedent Debts". — Purchasers of real property who execute purchase money notes and deeds of trust have no personal liability for the underlying indebtedness and the seller's remedy is to foreclose the deed of trust. This does not, however, render the debtors' obligations under the notes and deeds of trust any less an "antecedent debt." Carter v. Homesley (In re Strom), 46 Bankr. 144 (Bankr. E.D.N.C. 1985).

Article 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.44. Validation of foreclosure sales when provisions of G.S. 45-21.17(2) not complied with.

In all cases prior to March 1, 1974, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to 20 days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G.S. 45-21.17(2) had been fully complied with. (1959, c. 52; 1963, c. 1157; 1971, c. 879, s. 1; 1975, c. 454, s. 2; 1985, c. 689, s. 15.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 45-21.17(2)" for "§ 45-21.17(c)(2)" in the catchline and substituted "G.S. 45-21.17(2)" for "G.S. 45-21.17(c)(2)" near the end of the section.

§ 45-21.46. Validation of foreclosure sales where posting and publication not complied with.

(a) In all cases of foreclosure of mortgages or deeds of trust secured by real estate pursuant to power of sale which foreclosures were commenced on or subsequent to June 6, 1975, and consummated prior to June 1, 1983, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced before January 1, 1984.

(b) All foreclosures of mortgages or deeds of trust secured by real estate pursuant to power of sale, which foreclosures were commenced on or subsequent to June 1, 1983, and consummated prior to April 1, 1985, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced in the period beginning January 1, 1984, and ending January 1, 1986. (1983, c. 582, s. 1; c. 738, s. 1; 1985, c. 341.)

Effect of Amendments. — The 1985 amendment, effective June 6, 1985, designated the first paragraph as subsection (a) and added subsection (b).

§ 45-21.47. Validation of foreclosure sales when trustee is officer of owner of debt.

All sales of real property made prior to June 1, 1985, under a power of sale contained in a mortgage or deed of trust for which the trustee was an officer, director, attorney, agent, or employee of the owner of all or part of the debt secured by the mortgage or deed of trust are validated and have the same effect as if the trustee had not been an officer, director, attorney, agent, or employee of the owner of the debt unless an action to set aside the foreclosure is commenced within one year after June 1, 1985. (1983, c. 582, s. 1; 1985, c. 604.)

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, substituted "June 1, 1985" for "June 1, 1983" in two places.

§ 45-21.48. Validation of certain foreclosure sales that did not comply with posting requirement.

A sale of real property made on or before July 2, 1985, under a power of sale contained in a mortgage or deed of trust, for which a notice of the sale was not posted at the courthouse door for 20 days immediately preceding the sale, as required by G.S. 45-21.17(1), but was posted at the courthouse door for at least 15 days immediately preceding the sale, is declared to be a valid sale to the same extent as if the notice of the sale had been posted for 20 days; unless an action to set aside the foreclosure sale is not barred by the statute of limitations and is commenced on or before October 1, 1985. (1985, c. 567, s. 2.)

Editor's Note. — Session Laws 1985, c. 567, s. 3 makes this section effective upon ratification, and provides that nothing in the act shall affect pending litigation. The act was ratified July 2, 1985.

Article 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.

(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by
   a. The trustee,
   b. The mortgagee,
   c. The legal representative of a trustee or mortgagee, or
   d. A duly authorized agent or attorney of any of the above.
   Upon acknowledgment of satisfaction, the register of deeds shall forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds, who shall also affix his name thereto.

(2) By exhibition of any deed of trust, mortgage or other instrument accompanied with the bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon by
   a. The obligee,
   b. The mortgagee,
   c. The trustee,

d. An assignee of the obligee, mortgagee, or trustee, or
e. Any chartered banking institution, national or state, or credit union, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

Upon exhibition of the instruments, the register of deeds shall cancel the mortgage, deed of trust or other instrument by entry of satisfaction on the margin of the record. The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments exhibited. The exhibition of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it. The register of deeds may require the person exhibiting the instruments for cancellation to furnish him an acknowledgment of cancellation of the mortgage, deed of trust or other instrument for the purpose of showing upon whose request and exhibition the mortgage, deed of trust or other instrument was canceled.

(3) By exhibiting to the register of deeds by:
a. The grantor,
b. The mortgagor, or
c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the bond, note or other instrument secured thereby, or by exhibition of the mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so exhibited have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

The register of deeds shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

(4) By exhibition to the register of deeds of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Upon exhibition of the deed of trust, and the evidences of indebtedness properly marked, the register of deeds shall

cancel such deed of trust by entry of satisfaction upon the margin of the record, which entry shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of indebtedness has previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft on the margin of the record of the deed of trust.

Upon receipt of written notice of loss or theft of the deed of trust or evidences of indebtedness the register of deeds shall make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice. The deed of trust shall not be canceled after such marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a)(1) shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible. The register of deeds may refuse to accept any document when the provisions of this subsection have not been met. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C.S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746; 1975, c. 305; 1985, c. 219.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) is set out here in order to correct an error in indentation in subdivision (a)(3)c in the main volume.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added subsection (f).

OPINIONS OF ATTORNEY GENERAL

An attorney is not required to present a written authorization or instrument agency in recordable form in order to acknowledge satisfaction of the provisions of a deed of trust. See opinion of Attorney General to Mr. R. Wendell Hutchins, Counsel to the Commissioners for the County of Washington, 54 N.C.A.G. 71 (1985).

Article 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-68. Requirements.

A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(2) At the time of incurring any such future obligations, each obligation is evidenced by a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such security instrument; provided, however, that this subsection shall apply only if the obligor and obligee have contracted in writing that each future obligation shall be evidenced by a written instrument or notation; and

(1969, c. 736, s. 1; 1985, s. 457.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective June 24, 1985, and applicable to security instruments executed on or after that date, added the proviso at the end of subdivision (2).

Article 9.

Instruments to Secure Equity Lines of Credit.

§ 45-81. Definition.

(a) The term "equity line of credit" means an agreement in writing between a lender and a borrower for an extension of credit pursuant to which:

(1) At any time within a specified period not to exceed 15 years the borrower may request and the lender is obligated to provide, by honoring negotiable instruments drawn by the borrower or otherwise, advances up to an agreed aggregate limit;

(2) Any repayments of principal by the borrower within the specified period will reduce the amount of advances counted against the aggregate limit; and

(3) The borrower's obligation to the lender is secured by a mortgage or deed of trust relating to real property which mortgage or deed of trust shows on its face the maximum principal amount which may be secured at any one time and that it secures an equity line of credit governed by the provisions of this Article.

(b) As used in subdivision (a)(1) of this section, "lender is obligated" means that the lender is contractually bound to provide advances. The contract must set forth any events of default by the borrower, or other events not within the lender's control, which may relieve the lender from his obligation, and must state whether or not the lender has reserved the right to cancel or terminate the obligation.

(c) At any time when the balance of all outstanding sums secured by a mortgage or deed of trust pursuant to the provisions of this Article is zero, the lender shall, upon the request of the borrower, make written entry upon the security instrument showing payment and satisfaction of the instrument; provided, however, that such security instrument shall remain in full force and effect for the term set forth therein absent the borrower's request for such written entry. No prepayment penalty may be charged with respect to an equity line of credit loan. (1985, c. 207, s. 2.)

Editor's Note. — Session laws 1985, c. 207, s. 3 makes this Article effective on ratification. The act was ratified May 20, 1985.

§ 45-82. Priority of security instrument.

A mortgage or deed of trust which shows on its face that it secures an equity line of credit governed by the provisions of this Article, shall, from the time of its registration, have the same priority to the extent of all advances secured by it as if the advances had been made at the time of the execution of the mortgage or deed of trust, notwithstanding the fact that from time to time during the term of the loan no balance is outstanding. Payments made by the lender for insurance, taxes, and assessments and other payments made by the lender pursuant to the deed of trust shall have the same priority as if made at the time of the execution of the mortgage or deed of trust, notwithstanding the maximum principal amount set forth in the mortgage or deed of trust. (1985, c. 207, s. 2.)

§ 45-83. Future advances statute shall not apply.

The provisions of Article 7 of this Chapter shall not apply to an equity line of credit or the instrument securing it, if the instrument shows on its face that it secures an equity line of credit governed by the provisions of this Article. (1985, c. 207, s. 2.)

§ 45-84. Article not exclusive.

Except as otherwise provided in G.S. 45-83, the provisions of this Article are not exclusive, and no mortgage or deed of trust which secures a line of credit or other obligation shall be invalidated by failure to comply with the provisions of this Article. (1985, c. 207, s. 2.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 28A-17-3" for "G.S. 28-81" near the end of the section.

Article 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which formerly read: "Whenever it appears by satisfactory proof that an actual partition of the land cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof."

CASE NOTES

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The Commissioner shall also certify to the Court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the Court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, designated the first paragraph as subsection (a) and added subsection (b).

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding:

a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or

b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or

c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and

(2) The purchaser has not agreed in writing to assume the lien; and

(3) The lien will not be satisfied out of the proceeds of the sale; and

(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote subsection (a), substituted "party petitioning for revocation" for "purchaser" near the beginning of the first sentence of subsection (b), inserted "In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed" at the beginning of the introductory language of subsection (c), inserted "and" at the end of subdivisions (c)(1), (c)(2), and (c)(3), in subdivision (c)(4) substituted "any money or security" for "any moneys or security" and "pursuant to the offer" for "pursuant to his offer," added the second paragraph of subsection (c), rewrote subsection (d), which read: "The order of the court in revoking an order of confirma-

tion under this section may not be introduced in any other proceeding to establish or deny the existence of the lien," and added subsection (e).

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which read: "After the order of confirmation has been entered, the successful bidder may immediately purchase the property upon which he bid; and upon the exercise of such election, the order of confirmation shall become final."

Article 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

Article 2.

Registration.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

CASE NOTES

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.

CASE NOTES

I. IN GENERAL.

The object of this section, etc. —
The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Section Intended Primarily to Protect, etc. —
The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

Construction of this Section and § 47-18, etc. —
This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

IV. NOTICE.

No Mere Notice, etc. —
In accord with original. See Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Applied in Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

§ 47-32.2. Violation of § 47-30 or 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-51. Official deeds omitting seals.

All deeds executed prior to April 1, 1985, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to April 1, 1985: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the last sentence.

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to April 1, 1985. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" at the end of the section.

§ 47-71.1. Corporate seal omitted prior to April 1, 1985.

Any corporate deed, or conveyance of land in this State, made prior to April 1, 1985, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "January, 1981" in the catchline and for "May 1, 1983" near the beginning of the text of the section.

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to April 1, 1985, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to April 1, 1985, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7.)

Editor's Note. —
Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Effect of Amendments. —
The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the second paragraph.

Chapter 47A.
Unit Ownership.

Article 1.
Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Article 2.
Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

CASE NOTES

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984).

Chapter 48.

Adoptions.

§ 48-2. Definitions.

In this Chapter, unless the context or subject matter otherwise requires —

(1) a., b. Repealed by Session Laws 1985, c. 758, s. 4, effective October 1, 1985.

(1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1; 1985, c. 758, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, deleted paragraphs (1)a and (1)b, which defined "abandoned child."

§ 48-3.1. Application of G.S. 14-320.

The separation of a child under six months old from a custodial parent for the purpose of adoption shall be subject to the provisions of G.S. 14-320. (1985, c. 240, s. 1.)

Editor's Note. — Session Laws 1985, c. 240, s. 3 makes this section effective on ratification. The act was ratified May 23, 1985.

§ 48-5. When parent is not necessary party to adoption proceedings.

(c) In all cases where a district court has heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A, the parent whose parental rights were terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required.

(d) In the event that a district court has not heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A, the petitioner in the adoption proceeding, when there has been a determination of abuse or neglect under Article 44 of Chapter 7A, may file a petition in district court to terminate the parental rights of either or both parents pursuant to Article 24B of Chapter 7A. In such case the court in the adoption proceeding, upon request of the petitioner, shall continue the adoption proceeding until a final disposition has been made on the petition to terminate parental rights.

(d1) In the event that there is a guardian of the person of the child, the petitioner in the adoption proceeding may file a petition with the clerk of superior court who appointed the guardian to remove him upon one or more of the grounds set forth in G.S. 7A-289.32(2), (4) and (8) for terminating parental rights. In such case the court in the adoption proceeding, upon request of the petitioner, shall continue the adoption proceeding until a final disposition has been made on the petition to remove the guardian.

(e) If the district court enters an order terminating parental rights pursuant to Article 24B of Chapter 7A or if the clerk of superior court enters an order removing the guardian of the person, the consent of the parent whose parental rights are terminated or the consent of the guardian who is removed shall not be required.

(f) A copy of the order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A or a copy of the order removing the guardian of the person must be filed in the adoption proceeding, and consent must be given or withheld in accordance with G.S. 48-9(a)(2) or (a)(3). (1949, c. 300; 1957, c. 90; c. 778, s. 3; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; 1977, c. 879, s. 2; 1979, c. 107, s. 7; 1985, c. 758, ss. 5-9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, in subsection (c) substituted "heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A" for "entered an order pursuant to G.S. 7A-288 or Article 24B of Chapter 7A terminating the parental rights with respect to a child adjudicated to be neglected or dependent," and substituted "were terminated" for "with respect to such child may have been terminated," rewrote subsection (d), inserted new subsection (d1), and rewrote subsections (e) and (f).

§ 48-9. When consent may be given by persons other than parents.

(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person:

(1) When the parent, parents, or guardian of the person of the child has in writing surrendered the child to a director of social services of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of social services or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of social services may accept the surrender of a child regardless of its place of birth or the residence of the parent or parents.

(2) If the court finds as a fact that there is no person qualified to give consent, or that an order terminating the parental rights of one or both parents under G.S. 48-5(d) and (e) has been entered by the district court or an order removing the guardian of the person of the child under G.S. 48-5(d1) and (e) has been entered by the clerk of superior court, the

court shall appoint some suitable person or the county director of social services of the county in which the child resides to act in the proceeding as guardian ad litem of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-289.31 (or former G.S. 7A-288) or when a clerk of superior court has entered an order removing the guardian of the person, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as guardian ad litem of the child.

(1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, substituted the language beginning "an order terminating the parental rights" and ending "entered by the clerk of superior court" for "the child has been abandoned by one or both parents or by the guardian of the person of the child" in the first sentence of subdivision (a)(2) and in subdivision (a)(3) inserted "(or former G.S. 7A-288) or when a clerk of superior court has entered an order removing the guardian of the person".

§ 48-11. Consent not revocable.

(a) No consent described in G.S. 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree has been waived in accordance with the provisions of G.S. 48-21: Provided, no consent shall be revocable after three months from the date of the giving of the consent unless no adoption proceeding is instituted within 18 months from the date of the giving of the consent in which case the consent may be revoked; provided further, that when the consent has been given generally to a director of social services or to a duly licensed child-placing agency, it shall not be revocable after 30 days from the date of the giving of the consent unless no adoption proceeding is instituted within 18 months from the date of the giving of the consent in which case the consent may be revoked. When the consent of any person or agency is required under the provisions of this Chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding; and no service of any process need be made upon such person or agency.

(1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, in the first sentence of subsection (a) deleted "or a final order of adoption when entering of an interlocutory decree" preceding "has been waived," inserted "unless no adoption proceeding is instituted within 18 months from the date of the giving of the consent in which case the consent may be revoked" in two places.

§ 48-12. Nature of proceeding; venue.

CASE NOTES

Original Jurisdiction. — Adoption proceedings are within the original jurisdiction of the clerk of superior court. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

Adoption proceedings are special proceedings and not civil actions. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

Applicable Procedural Rules and Statutes. — Although an adoption proceeding is a special proceeding, no separate procedure is prescribed by statute so the Rules of Civil Procedure and the statutes governing special proceedings, § 1-393 et seq., would apply. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

§ 48-23. Legal effect of final order.

The following legal effects shall result from the entry of every final order of adoption:

(2a) Notwithstanding subdivisions (1) and (2), a biological grandparent is entitled to visitation rights with the adopted child as provided in G.S. 50-13.2(b1), 50-13.2A, and 50-13.5(j).

(3) From and after the entry of the final order of adoption, the words "child," "grandchild," "heir," "issue," "descendant," or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section. The use of the phrase "hereafter born" or similar language in any deed, grant, will, or other written instrument to establish a class of persons shall not by itself be sufficient to exclude adopted persons from inclusion within the class. This subdivision applies to instruments executed before October 1, 1985.

(4) Where an interlocutory decree has been entered in an adoption proceeding and one of the petitioners dies before the final order of adoption is entered, if the spouse of the deceased petitioner later obtains a final order of adoption, then:

a. The child shall have the status defined in subdivisions (1) and (3) of this section with respect to the deceased petitioner;

b. The child shall be entitled to inherit real and personal property by, through, and from the deceased petitioner in accordance with the statutes relating to intestate

succession and shall be held to be the "child," "grandchild," "heir," "issue," "descendant," or an equivalent, of the deceased petitioner;

c. The use of the word "child," "grandchild," "heir," "issue," or "descendant," or any word of like import in any deed, grant, will, or other written instrument executed by the deceased petitioner shall be held to include the child, whenever appropriate, unless the contrary plainly appears by its terms; and

d. The use of the phrase "hereafter born" or similar language in any deed, grant, will or other written instrument executed by the deceased petitioner to establish a class of persons shall not by itself be sufficient to exclude the child from the class. This subdivision applies to instruments executed before October 1, 1985.

(5) From and after the entry of the final order of adoption, any reference to a natural person in any deed, grant, will, or other written instrument executed on or after October 1, 1985, shall include any adopted person unless the instrument explicitly states that adopted persons are excluded, whether the instrument was executed before or after the entry of the final order of adoption.

(6) Where an interlocutory decree has been entered in an adoption proceeding and one of the petitioners dies before the final order of adoption is entered, if the spouse of the deceased petitioner later obtains a final order of adoption, any reference to a natural person in any deed, grant, will, or other written instrument executed by the deceased petitioner on or after October 1, 1985, shall include the child unless the instrument explicitly states that adopted persons are excluded. (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967; 1967, c. 619, s. 5; 1983, c. 454, s. 6; 1985, c. 67, ss. 1-4; c. 575, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1985, c. 67, ss. 1-4, effective October 1, 1985, added the last two sentences of subdivision (3), rewrote subdivision (4), and added subdivisions (5) and (6).

Session Laws 1985, c. 575, s. 1, effective October 1, 1985, and applicable to pending litigation and actions or proceedings filed on or after that date, whether the adoption was final before or after October 1, 1985, inserted subdivision (2a).

CASE NOTES

I. IN GENERAL.

Applied in Pittman v. Pittman, — N.C. App. —, 327 S.E.2d 8 (1985).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

CASE NOTES

Applied in Wilkinson v. Riffel, — N.C. App. —, 324 S.E.2d 31 (1984).

§ 48-26. Procedure for opening record for necessary information.

(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction. The movant must serve a copy of the motion, with proof of service, upon the Department of Human Resources, and the county department of social services or the licensed child placing agency which prepared the report in response to the order of reference issued pursuant to G.S. 48-16. The clerk of superior court shall give at least five days' notice to the Department of Human Resources and county department of social services or licensed child placing agency of every hearing on this motion, whether the hearing is before the clerk or a judge of the superior court, and the Department of Human Resources and the county department of social services or licensed child placing agency shall be entitled to appear and be heard in response to the motion. After hearing, the clerk may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.

(1949, c. 300; 1985, c. 448.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted "who may issue an order to open the record" at the end of the first sentence of subsection (a) and inserted the present second, third and fourth sentences of that subsection.

Chapter 49.
Bastardy.

Article 3.
Civil Actions Regarding Illegitimate Children.

Article 1.
Support of Illegitimate Children.

§ 49-1. Title.

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

CASE NOTES

I. IN GENERAL.

Applied in Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. —

Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, Att'y General's petition for supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, Att'y General's petition for supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, Att'y General's petition for supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, Att'y General's petition for supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

Verdict Held Insufficient. —

A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither

alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, Att'y General's petition for supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

§ 49-7. Issues and orders.

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(d) If the action to establish paternity is brought more than three years after birth of a child, paternity shall not be established in a contested case without evidence from a blood grouping test, or evidence that the putative father has declined an opportunity for such testing. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added "at any time prior to such child's eighteenth birthday" at the end of the first sentence of subsection (a) and added subsection (d).

CASE NOTES

Purpose. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Claim of Being Tricked into Fathering Child Not Appropriate as Defense. — Argument of defendant in

paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial reponsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-15. Custody and support of illegitimate children when paternity established.

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984).

Chapter 50.

Divorce and Alimony.

§ 50-2. Bond for costs unnecessary.

Legal Periodicals. — For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984).

§ 50-4. What marriages may be declared void on application of either party.

CASE NOTES

Applied in Fulton v. Vickery, — N.C. App. —, 326 S.E.2d 354 (1985).

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

I. IN GENERAL.

Applied in Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

§ 50-7. Grounds for divorce from bed and board.

The court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases if either party:

(1) Abandons his or her family.

(6) Commits adultery. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C.S., s. 1660; 1967, c. 1152, s. 7; 1971, c. 1185, s. 22; 1979, c. 561, s. 5; 1985, c. 574, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, added "if either party" at the end of the introductory language, deleted "If either party" at the beginning of subdivision (1), and added subdivision (6).

CASE NOTES

I. IN GENERAL.

Suit for divorce from bed and board is not exclusively a means for collection of alimony, but also a means of establishing a certain legal relationship. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Every ground for divorce from bed and board also serves as a ground for alimony. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury. Nothing herein shall require notice of trial to be given to a defendant who has not made an appearance in the action. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C.S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460; 1981, c. 12; 1983 (Reg. Sess., 1984), c. 1037, s. 4; 1985, c. 140.)

Effect of Amendments.

The 1985 amendment, effective July 1, 1985, added the last sentence.

CASE NOTES

Applied in Fulton v. Vickery, — N.C. App. —, 326 S.E.2d 354 (1985).

§ 50-12. Resumption of maiden name or adoption of name of prior deceased or prior divorced husband.

(a) Any woman whose marriage is dissolved by a decree of absolute divorce may, upon application to the clerk of court of the county in which she resides setting forth her intention to do so, change her name to any of the following:

(1) Her maiden name; or

(2) The surname of a prior deceased husband; or

(3) The surname of a prior living husband if she has children who have that husband's surname.

(b) The application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county and state in which the divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall record and index such applications in such manner as shall be required by the Administrative Office of the Courts.

(c) If a woman, since her divorce, has adopted one of the surnames listed in subsection (a) of this section, her use and adoption of that name is validated.

(d) In the complaint, or counterclaim for divorce filed by any woman in this State, she may petition the court to adopt any surname as provided by this section, and the court is authorized to incorporate in the divorce decree an order authorizing her to adopt that surname. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394; 1971, c. 1185, s. 23; 1981, c. 494, ss. 1-4; 1985, c. 488.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section.

§ 50-13.1. Action or proceeding for custody of minor child.

Editor's Note. — Session Laws 1983, c. 761, s. 162, which provides a local modification of this section for Mecklenburg County, as noted in the replacement volume, as amended by Session Laws 1985, c. 698, s. 18(a), expires June 30, 1987.

CASE NOTES

Applied in In re Shue, 311 N.C. App. 586, 319 S.E.2d 567 (1984).

Cited in Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(b1) An order for custody of a minor child may provide visitation

rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2; 1985, c. 575, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to pending litigation and actions or proceedings filed on or after that date, whether the adoption was final before or after October 1, 1985, added the last two sentences of subsection (b1).

§ 50-13.2A. Action for visitation of an adopted grandchild.

A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody. (1985, c. 575, s. 2.)

Editor's Note. — Session Laws 1985, c. 575, s. 5 makes this section effective October 1, 1985, and applicable to pending litigation and actions or proceedings filed on or after that date, whether the adoption was final before or after October 1, 1985.

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Quoted in Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

§ 50-13.4. Action for support of minor child.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other

means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) An order for the periodic payments of child support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales;

and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective July 11, 1985, substituted "Article 16 of Chapter 1C" for "Article 32 of Chapter 1" near the end of subsdivision (f)(10).

CASE NOTES

I. IN GENERAL.

Applied in Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984); Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984); Toney v. Toney, — N.C. App. —, 323 S.E.2d 434 (1984); Massey v. Massey, — N.C. App. —, 323 S.E.2d 451 (1984).

Cited in Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865 (1984).

III. LIABILITY FOR SUPPORT.

Subsection (b) imposes primary liability upon both the father and mother to support a minor child. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Equal Duty of Support Is Rule Rather than Exception. — Today, the equal duty of both parents to support their children is the rule rather than the exception is virtually all states. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Equal legal duty to support does not impose an equal financial contribution by both parties. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties. Rather, the amount of each parent's obligation varies in accordance with their respective financial resources. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Equal Financial Contributions Not Imposed Where Unfair or Burdensome. — The parental obligation for child support is not primarily an obligation of the father but is one shared by both parents. This equal duty to support, however, does not impose upon both parties an equal financial contribution when such an allocation would be unfair or place too great a burden on a party. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Amount of Each Party's Contribution Determined on Case-by-Case Basis. — The amount of each party's contribution to child support is generally determined by the judge on a case-by-case basis. The judge must evaluate the circumstances of each family and also consider certain statutory requirements in fixing the amount of child support. Subsection (c) of this section mandates that the trial judge consider the certain factors in setting child support amounts. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Children with Property of Their Own. — There is nothing in the statute to suggest any legislative intent to change the firmly established rule that the supporting parent who can do so remains obligated to support his or her minor children, even though they may have property of their own. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

IV. AMOUNT OF SUPPORT.

A. In General.

No precise formula exists to assist the court in determining a fair support award, and the uniqueness of each divorce renders a precedent almost valueless. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Ability to Pay and Needs, etc.—

An order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Judge's consideration of the factors contained in subsection (c) of this section is not guided by any magic formula. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Ordinarily, Present Earnings, etc.—

The general rule is that the ability of a party to pay child support is determined by that person's income at the time the award is made. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

The ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Finding Where Award, etc. —

In accord with 2nd paragraph in original. See Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

Amount of Award Is Within Trial Court's Discretion. — Once an award is found to be justified, the amount lies within the trial court's discretion and will not be disturbed absent manifest abuse. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Estate and Earnings of Both Husband and Wife, etc. —

In accord with original. See Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Findings as to Child's Past and Present Expenses Required. — In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

VII. FINDINGS AND CONCLUSIONS.

And Must Cover Factors in Subsection (c). —

The trial court must make specific findings on each of the factors specified in subsection (c) of this section. In addition, the case law may require certain findings, as when the award is based on earning capacity rather than present income. Once the trial court has made such findings, they are conclusive if supported by any evidence, even if there is evidence contra. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The trial judge must at least make findings sufficiently specific to indicate proper consideration of each of the factors established by subsection (c) of this section for a determination of child support. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

Orders for child support must be based upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative abilities of the parents to provide that amount. These conclusions must, in turn, be based upon factual findings sufficiently specific to indicate to the appellate court that the trial court took due regard of the estates, earnings, conditions and accustomed standard of living of both child and parents. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

To comply with subsection (c) of this section, the order for child support must be premised upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative ability of the parties to provide that amount. To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave due regard to the facts of the particular case. Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. Where the record discloses sufficient evidence to support the findings, it is not the Supreme Court's task to determine de novo the weight and credibility to be given the evidence contained in the record on appeal. Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

Conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took "due

regard" of the factors enumerated in the statute. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

Findings must be based upon competent evidence, and it is not enough that there may be evidence, in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

IX. REMEDIES.

A. In General.

Court Had No Authority to Order Payment of Social Security Benefits Directly to Mother. — A North Carolina district court had no authority to order the Social Security Administration and defendant father, a representative payee receiving Social Security disability payments for the benefit of his children, to pay those benefits directly to plaintiff mother. Brevard v. Brevard, — N.C. App. —, 328 S.E.2d 789 (1985).

§ 50-13.5. Procedure in actions for custody or support of minor children.

(j) Custody and Visitation Rights of Grandparents. — In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to pending litigation and actions or proceedings filed on or after that date, whether the adoption was final before or after October 1, 1985, added the last two sentences of subsection (j).

CASE NOTES

I. IN GENERAL.

Legislature apparently intended to provide the maximum range of choice among procedures for determination of child custody and support. Latham v. Latham, — N.C. App. —, 329 S.E.2d 721 (1985).

Remarriage Does Not Reduce Choice of Procedures. — The statutory scheme of this section provides for an election of procedures in actions for custody or support; there is no reason why the remarriage of the parties should reduce the choices available. Latham v. Latham, — N.C. App. —, 329 S.E.2d 721 (1985).

Applied in Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Glesner v. Dembrosky, — N.C. App. —, 327 S.E.2d 60 (1985).

II. TYPE OF ACTION.

Divorce action is pending for purposes of determining custody and support until the death of one of the parties or until the youngest child born of the marriage reaches maturity, whichever event occurs first. Latham v. Latham, — N.C. App. —, 329 S.E.2d 721 (1985).

III. JURISDICTION AND VENUE.

A. In General.

Remarriage of parties to each other does not divest court of its continuing jurisdiction over the minor child acquired in action for divorce. Latham v. Latham, — N.C. App. —, 329 S.E.2d 721 (1985).

VI. TEMPORARY CUSTODY AND SUPPORT.

Once one of the bases for jurisdiction listed in § 50A-3(a) has been established, the court may enter an ex parte order for temporary custody prior to service of process or notice, if the circumstances of the case render it appropriate. Hart v. Hart, 70 N.C. App. 690, 327 S.E.2d 631 (1985).

VII. VISITATION RIGHTS.

B. Denial of Parents' Rights.

Findings Required, etc. —

Subsection (i) of this section requires specific findings of fact to justify certain visitation restrictions. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. IN GENERAL.

Applicable in Action Involving Illegitimate Child. — This section does not apply to civil actions to establish paternity under § 49-14, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity has been determined. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Order Must Contain Factual Findings. — A proper order under this section must contain factual findings upon which a determination of the reasonableness of the counsel fees might be based, e.g., findings as to the nature and scope of the legal services rendered, and the time and skill required. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

Contingent Fee Agreements Not Enforceable. — A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. Such a contract is unenforceable exclusively by virtue of the fact that it violates the public policy of this State. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984).

Reasonableness as Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Fees Where Increase in Support Not Warranted. — The court would abuse its discretion if, after determining that an increase in the award of child support was not warranted under the circumstances, it nevertheless proceeded to award attorney's fees to plaintiff. Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Merit Bonus. — While the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the rare case where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Review of Attorney's Fees on Appeal. — While whether the statutory requirements have been met is a question of law, reviewable on appeal, the

amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion. Atwell v. Atwell, — N.C. App. —, 328 S.E.2d 47 (1985).

Remand for Lack of Evidence, etc. —

Order awarding attorney's fees which failed to satisfy requirement of findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent was insufficient and case would be remanded for appropriate findings as to attorney fees. Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

Applied in Forbes v. Forbes, — N.C. App. —, 325 S.E.2d 272 (1985).

II. ACTIONS FOR SUPPORT ONLY.

Findings, etc. —

In actions for support only, the court may award reasonable attorney fees to a party if it finds: (1) that the party is acting in good faith; (2) that the party has insufficient means to defray the costs of the action; and (3) that the party ordered to pay support had not provided adequate support under the circumstances existing at the time of the institution of the action or proceeding. Plott v. Plott, — N.C. App. —, 327 S.E.2d 273 (1985).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

I. IN GENERAL.

Noncustodial parent is not entitled as a matter of law to a credit against accrued arrearage in child support for expenses incurred while the child was with the noncustodial parent. Each case must be decided upon it own facts, and the guiding principle is whether an injustice would exist if a credit is not given. Simmons v. Simmons, — N.C. App. —, 329 S.E.2d 723 (1985).

Decision to allow, or disallow, a credit to the noncustodial parent against accrued arrearage in child support expenses incurred while the child was with the noncustodial parent is a matter within the discretion of the trial judge. Simmons v. Simmons, — N.C. App. —, 329 S.E.2d 723 (1985).

Applied in Cartrette v. Cartrette, — N.C. App. —, 325 S.E.2d 671 (1985); Glesner v. Dembrosky, — N.C. App. —, 327 S.E.2d 60 (1985); Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

Stated in Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

Cited in Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

II. MODIFICATION, GENERALLY.

Arbitration Award, etc. —

Because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not binding. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Continuing Obligation to Support Illegitimate Child. — Section 49-7, read together with this section, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

III. CHANGE IN CIRCUMSTANCES.

Meaning of "Changed Circumstances." —

In accord with 1st paragraph in original. See O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 ((1984).

Change Must Be Substantial. —

In accord with 2nd paragraph in original. See O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

Removal of Parent to Another Residence. —

While it is true that a parent's change of residence does not of itself amount to a substantial change of circumstances, the effects of such a move on the welfare

of the child may well amount to a change of circumstances requiring modification of the original custody order. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Findings as to Past Expenditures.—

In accord with original. See Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Evaluation of Parties' Fitness. — The trial court, in deciding cases involving the custody of children, may be called upon to evaluate the emotional stability and fitness of the parties. In making such an evaluation, the court, sitting as the trier of fact, may exercise its own reason and common sense, and use the knowledge acquired by its observation and experience in everyday life. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

Wide Discretion Is Vested, etc. — The trial judge, having the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of children. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

Even If There Is Evidence to the Contrary. —

In accord with original. See O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984).

§ 50-16.1. Definitions.

Legal Periodicals. —

For note, "Discarding the Dual Consent Judgment Approach in Family Law in Light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983)," see 20 Wake Forest L. Rev. 297 (1984). For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. (1985).

CASE NOTES

I. IN GENERAL.

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds for Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Applied in Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984).

Cited in Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

IV. DEPENDENT SPOUSE.

Accustomed Standard of Living Is Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Maintenance of Accustomed Standard of Living by Borrowing. — The fact that a spouse can maintain his or her accustomed standard of living, by whatever means, pending the outcome of alimony litigation, does not determine the dependent spouse-supporting spouse issue. A finding that a spouse was forced to borrow substantial funds in order to maintain her accustomed standard of living would ordinarily lead to the conclusion that she was a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Burden of Proving Dependency, etc. —

This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for

alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

V. SUPPORTING SPOUSE.

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

§ 50-16.2. Grounds for alimony.

Legal Periodicals. —
For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. (1985).

CASE NOTES

I. IN GENERAL.

Every ground for divorce from bed and board also serves as a ground for alimony. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds For Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Burden on Applicant for Alimony. — This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Accustomed Standard of Living Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Applied in Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Cited in Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

§ 50-16.3. Grounds for alimony pendente lite.

CASE NOTES

II. PREREQUISITES.

Prerequisites for Award of Counsel Fees. —

In accord with 1st paragraph in original. See Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

§ 50-16.4. Counsel fees in actions for alimony.

CASE NOTES

I. IN GENERAL.

And an award of attorney's fees for services performed on appeal, etc. —

In accord with original. See Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Prerequisites to Award of Attorney's Fees. —

In accord with 1st paragraph in original. See Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Contingent Fee Agreements Are Not Enforceable. — A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. Such a contract is unenforceable exclusively by virtue of the fact that it violates the public policy of this state. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984).

Effect of Motion for Involuntary Dismissal at Mid-Trial. — The trial court is not required to make a ruling on the merits of a party's request for attorneys' fees when presented with a motion for an involuntary dismissal at mid-trial. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

II. AMOUNT OF FEES.

Elements to Be Considered. —

In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant or appellant, the trial court is under an obligation to conduct a broad inquiry, considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Reasonableness Is Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Merit Bonus. — While the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the rare case where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

III. FINDINGS.

Remand for Findings. — Order awarding attorney's fees which failed to satisfy requirement of findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent was insufficient and case would be remanded for appropriate findings as to attorney fees. Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

§ 50-16.5. Determination of amount of alimony.

Legal Periodicals. —
For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. (1985).

CASE NOTES

I. IN GENERAL.

Applied in Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984); Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984).

II. BASIS OF AWARD.

Findings of Fact. —
The trial judge must at least make findings sufficiently specific to indicate proper consideration of each of the factors established by subsection (a) of this section for a determination of an alimony award. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

III. DISCRETION OF TRIAL COURT.

But Court's Discretion Will Not Be Disturbed, etc. —
In accord with 1st paragraph in original. See Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

(j) Any order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided if justice requires.

(k) The remedies provided by Chapter 1 of the General Statutes Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and alimony pendente lite as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(1967, c. 1152, s. 2; 1969, c. 541, s. 5; c. 895, s. 18; 1977, c. 711, s. 26; 1985, c. 482, s. 1; c. 689, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1985, c. 482, s. 1, effective July 1, 1985, substituted "Any order" for "An order" and substituted "Chapter 5A of the General Statutes" for "Chapter 5A, Contempt, of the General Statutes" in the first paragraph of subsection (j) and added the second paragraph of subsection (j).

Session Laws 1985, c. 689, s. 18, effective July 11, 1985, substituted "Article 16 of Chapter 1C" for "Article 32 of Chapter 1" at the end of subsection (k).

Legal Periodicals. — For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984).

CASE NOTES

I. IN GENERAL.

Possession of Real or Personal Property as Alimony. — There is no requirement that alimony be denominated as such for it to be a valid award of alimony. Furthermore, possession of real or personal property, including the marital home, is one form of alimony provided by statute. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Transfer of Title or Possession of Real Property. —

Subsections (b) and (c) of this section do not enlarge the authority given the trial judge in subsection (a). Rather, these subsections enable the court to order a transfer of title to real property to secure an award of alimony made under subsection (a). Thus, the trial judge may order the transfer of title to real property, but only if it is necessary to insure the payment of alimony. Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

CASE NOTES

I. IN GENERAL.

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

A party suing for divorce from bed and board may, but is not required to, apply for alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds for Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Burden on Applicant for Alimony. — This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Accustomed Standard of Living Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Applied in Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

§ 50-16.9. Modification of order.

Legal Periodicals. —

For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984). For note, "Discarding the Dual Consent Judgment Approach in Family Law in Light of Walters v. Walters, 307 N.C. 381, 298

S.E.2d 338 (1983)," see 20 Wake Forest L. Rev. 297 (1984). For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. (1985).

CASE NOTES

I. IN GENERAL.

Showing Necessary to Obtain Attorney Fees. —

In order to obtain an award of counsel fees in a proceeding seeking a modification of alimony subsequent to divorce, the party seeking the fees must show: (1) That he or she is a dependent spouse; (2) that he or she is entitled to the relief demanded based upon all the evidence; and (3) that he or she has insufficient means to defray the expenses of the proceeding. Cecil v. Cecil, — N.C. App. —, 328 S.E.2d 899 (1985).

Applied in Rowe v. Rowe, — N.C. App. —, 327 S.E.2d 624 (1985).

Stated in Ratton v. Ratton, — N.C. App. —, 327 S.E.2d 1 (1985).

Cited in Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

Legislative Intent. — The legislative intent, as expressed in this section, is that the public policy of North Carolina shall be in favor of modification of alimony provisions contained in consent judgments and the analogous area of incorporated separation agreements. Acosta v. Clark, 70 N.C. App. 111, 318 S.E.2d 551 (1984).

But This Rule Applies Only to Judgments after January 11, 1983. —

In accord with original. See Cecil v. Cecil, — N.C. App. —, 328 S.E.2d 899 (1985).

Support Provisions Merged into Consent Order so as to Preclude Modification. — Evidence held to support court's findings and conclusion that the support provisions in a separation agreement merged into a consent order and made a decree of the court were not separable but were reciprocal with the property settlement provisions, so as to preclude modification. Cecil v. Cecil, — N.C. App. —, 328 S.E.2d 899 (1985), decided under the law obtaining prior to the decision in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

§ 50-16.10. Alimony without action.

Alimony without action may be allowed by confession of judgment under G.S. 1A-1, Rule 68.1. (1967, c. 1152, s. 2; 1985, c. 689, s. 19.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 1A-1, Rule 68.1" for "Article 24, Chapter 1, of the General Statutes" at the end of this section.

§ 50-16.11. Judgment that a supporting spouse is not liable for alimony.

If a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, upon motion by the supporting spouse, the court shall enter a judgment against the spouse to whom the payments were made for the amount of all alimony paid by the supporting spouse to that spouse pending a final disposition of the case. In addition, upon motion by the supporting spouse, if a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, the court may enter a judgment against the spouse to whom the payments were made for the amount of alimony pendente lite paid by the supporting spouse to that spouse pending a final disposition of the case. When there has been judgment entered granting permanent alimony, after a prior denial of alimony pen-

dente lite upon the same allegations, the court may enter judgment against the supporting spouse and in favor of the dependent spouse in an amount equal to the monthly permanent alimony awarded multiplied by the number of months between entry of the prior order denying alimony pendente lite and entering of the final judgment.

A judgment awarded against a dependent spouse under this section may not be satisfied by setting off any award of child support to the dependent spouse. (1985, c. 482, s. 2.)

Editor's Note. — Session Laws 1985, c. 482, s. 2 makes this section effective July 1, 1985.

§ 50-19. Maintenance of certain actions as independent actions permissible.

(a) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action for divorce under the provisions of G.S. 50-5.1 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:

(1) Alimony;
(2) Alimony pendente lite;
(3) Custody and support of minor children;
(4) Custody and support of a person incapable of self-support upon reaching majority; or
(5) Divorce pursuant to G.S. 50-5.1 or G.S. 50-6.

(b) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the pendency of an action for divorce under G.S. 50-5.1 or G.S. 50-6.

(c) Notwithstanding the provisions of this section, any divorce obtained under G.S. 50-5.1 or G.S. 50-6 by a supporting spouse shall not affect the rights of a dependent spouse with respect to any action for alimony or alimony pendente lite that is pending at the time the judgment for divorce is granted. (1979, c. 709, s. 2; 1985, c. 689, s. 20.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 50-5.1" for "G.S. 50-5" throughout this section.

CASE NOTES

Applied in Arney v. Arney, 71 N.C. App. 218, 321 S.E.2d 472 (1984).

§ 50-20. Distribution by court of marital property upon divorce.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separa-

tion of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. Marital property includes all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code.

The distributive award of vested pension, retirement, and other deferred compensation benefits may be payments payable:

a. As a lump sum by agreement;
b. Over a period of time in fixed amounts by agreement; or
c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.

Notwithstanding the foregoing, the court shall not require the administrator of the fund or plan involved to make any payments until the party against whom the award is made actually begins to receive the benefits. The award shall be based upon the proportion of the amount of time the marriage existed simultaneously with the employment which earned the vested pension or retirement rights to the total amount of time of employment. Said award shall not be based on contributions made after the separation, but shall include any growth on the amount of the pension or retirement account vested at the time of the separation. In the event the person receiving the distributive award dies, full rights to vested pension, retirement, and other deferred compensation benefits, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act, shall belong to the party against whom the award is made. In the event the party against whom the

award is made dies, the person receiving the distributive award shall receive no further benefits. The total amount of contributions, years of service and pension, retirement, and other deferred compensation benefits shall be certified by the administrator of the plan or fund involved upon receipt of a court order to do so. No award shall exceed fifty percent (50%) of the cash benefits by the party against whom the award is made is entitled to receive. The provisions of this section and G.S. 50-21 shall apply to all retirement, pension, and other deferred compensation systems and funds administered by the State pursuant to General Statutes Chapters 118, 120, 127A, 128, 135, 143, 143B, and 147 to the extent of a member's accrued benefit at retirement or withdrawal as determined by the system's or fund's consulting actuary.

(c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;
(2) Any obligation for support arising out of a prior marriage;
(3) The duration of the marriage and the age and physical and mental health of both parties;
(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
(5) The expectation of nonvested pension, retirement, or other deferred compensation rights, which is separate property;
(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
(9) The liquid or nonliquid character of all marital property;
(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
(11) The tax consequences to each party;
(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and
(12) Any other factor which the court finds to be just and proper.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution

will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the marital or separate property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985, c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. —

Session Laws 1985, c. 31, ss. 1-3, effective October 1, 1985, in subsection (i) inserted "or separate property of the party seeking relief" at the end of the first sentence, inserted "or separate" preceding "property" at the end of the second sentence, and added the last sentence.

Session Laws 1985, c. 143, effective October 1, 1985, deleted "and" at the end of subdivision (c)(11) and added subdivision (c)(11a).

Session Laws 1985, c. 660, ss. 1-3, effective July 9, 1985, inserted references to other deferred compensation in subdivisions (b)(1), (b)(2), (b)(3) and (c)(5), and inserted reference to Chapters 143B and 147 in the last sentence of subdivision (b)(3).

Legal Periodicals. —

For article, "The Professional Degree as Marital Property Under North Carolina's Equitable Distribution Statute," see 6 Campbell L. Rev. 101 (1984).

CASE NOTES

This section is a remedial statute enacted to ensure a fairer distribution of marital assets than under common-law rules. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Public policy, etc. —

It is North Carolina's public policy that an equitable distribution of property shall follow a decree of absolute divorce (§ 50-21(a)). However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in § 50-20(d). Case v. Case, — N.C. App. —, 325 S.E.2d 661 (1985).

Effect of Section. — This section was enacted in recognition of marriage as a partnership, economic and otherwise, to which both parties contribute, either directly or indirectly. By enacting this section, the Legislature granted courts the power to consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage, thereby permitting the courts to make an equitable distribution which effects a return to each party of that which he or she contributed to the marriage. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Subsection (d) was enacted to insure against fraud and overreaching on the part of one of the spouses. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

Effect of Subsection (d). — By the enactment of subsection (d) of this section, the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage in order for a property settlement to be effective between spouses. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

The public policy of the state, as expressed by subsection (d) of this section, permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Validity of Separation Agreement. — To be valid, a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

Cancellation of Separation Agreements. — In enacting subsection (d) of this section, the General Assembly did not intend that a written separation agreement, once entered into, would be forever binding or forever a bar to an equitable distribution action. Rather, the parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in the common law must also still be intact. Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

Stipulations as to Division of Marital Property Must Be Scrutinized. — The same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

Distribution Agreement Should Be Written, Executed, and Acknowledged. — Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

Otherwise, Record Must Show Understanding of and Agreement with Terms. — If oral stipulations between spouses regarding the distribution of their marital property are not reduced to writing, it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties, and that the parties understood the legal effects of their agreement and the terms of the agreement and agreed to abide by those terms of their own free will. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

If parties who had entered into a 1963 separation agreement divided and conveyed property prior to resuming their marital relationship, then the provisions of the separation agreement concerning that property were "executed," and an equitable distribution suit to divide that property upon the parties' again separating in 1982 would be barred, unless the evidence showed an intent to cancel those provisions of the separation agreement. Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

Wife's promise in 1963 separation agreement that she would make no future claims to husband's future property required future performance and therefore was executory, and where the parties became reconciled and lived again as husband and wife between 1963 and 1982, then this promise was void as to property acquired after they resumed the marital relationship. A suit for equitable distribution of this property was therefore proper. Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

As to history and purposes of the Equitable Distribution Act, see White v. White, — N.C. —, 324 S.E.2d 829 (1985).

The Equitable Distribution Act reflects a trend nationwide towards recognizing marriage as a partnership, a shared enterprise to which both spouses make valuable contributions, albeit often in different ways. Loeb v. Loeb, — N.C. App. —, 324 S.E.2d 33 (1985).

Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Task of a trial court when faced with an action under this section is to equitably distribute the marital property between the litigants. This is evident from the language and the title of the Act. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Procedure Generally. — In an action for equitable distribution first the court must classify property as either marital or separate as defined in subdivisions (b)(1) and (b)(2) of this section. Next it must divide the marital property equally, unless it determines that an equal division is not equitable. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Equal division of marital property is favored by the public policy behind the Equitable Distribution Act. Weaver

v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985).

Presumption of Equal Division. — In accord with 1st paragraph in original. See Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), cert. granted, — N.C. —, 326 S.E.2d 33 (1985).

This section sets forth a presumption of equal division, which requires that the marital property be equally divided between the parties in the usual case and in the absence of some reason(s) compelling a contrary result. The presumption may be overcome. Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), cert. granted, — N.C. —, 326 S.E.2d 33 (1985).

Pursuant to this section, an equal division of the marital property of the parties is presumed appropriate. However this section does not create a "presumption" in any of the senses that term has been used to express the common idea of assuming or inferring the existence of one fact from another fact or combination of facts. Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made mandatory unless the court determines that an equal division is not equitable. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support have not been previously awarded, equitable distribution must be made first. McIntosh v. McIntosh, — N.C. App. —, 328 S.E.2d 600 (1985).

Legislative intent is that rights of creditors without notice be protected in the equitable distribution of real property. Branch Banking & Trust Co. v. Wright, — N.C. App. —, 328 S.E.2d 840 (1985).

Legislature's intent in subsection (k) was to create a right to equitable distribution of the marital property, which had not existed up to that time, and to make that right vest at the time of filing for divorce. Subsection (k) did not create any vested rights in particular marital property; it created a right to the equitable distribution of that property, whatever a court should determine that property is. Wilson v. Wilson, — N.C. App. —, 325 S.E.2d 668 (1985).

Burden of Proving Equal Division Not Equitable. — The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court must divide the marital property equally. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Specific Statement that Distribution Equitable Not Required. — Once the trial court orders a distribution, it has held sub silentio that such distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support has not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it. Capps v. Capps, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

To equitably distribute property, it is necessary to identify the property owned, evaluate it and order its distribution. Capps v. Capps, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

Statement of Reasons for Unequal Division. —

In accord with 2nd paragraph in original. See Weaver v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985).

If, in a particular case, the trial court concludes, after its consideration of all the statutory factors and any nonstatutory factors raised by the evidence which are reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the court may properly order an unequal division; in this case, it should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable. Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), cert. granted, — N.C. —, 326 S.E.2d 33 (1985).

Where the court determines that equal division is not equitable, it should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

In making its determination, the court must consider the factors listed in subsection (c) and set forth findings of fact in its judgment reflecting its consideration of the relevant factors. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

The trial court need only make findings of fact on the statutory and nonstatutory factors when it has concluded that an equal division is inequitable. Weaver v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985).

If, in a particular case, the court concludes after its careful and clearly articulated consideration of all of the statutory factors and of any nonstatutory factor raised by the evidence which is reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the trial court may properly order an unequal division, but should state in its order the basis and reasons for its division. Weaver v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985).

Court Must Weigh Factors and Balance Evidence. — When evidence tending to show that an equal division of marital property would not be equitable is admitted, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Misconduct During Litigation Not to Be Considered. — The court may not punish a plaintiff by considering his misconduct during litigation as a factor under subdivision (c)(12). Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Net Value Used to Determine Equitable Distribution. — In determining what distribution of the property is equitable, the court must use the net value of the property rather than its fair market value. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Marital Property to Be Equitably Divided. — To the extent the property is marital in character, it is to be equitably divided between the parties along with the other marital property. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

This section mandates a complete listing of marital property, and an order that fails to do so is fatally defective. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

Marital Property to Be Valued at Net Value. — Net value, rather than fair market value, is the proper measure for valuing marital property for equitable distribution. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

"Acquired" as Used in Subdivision (b)(1). — A dynamic rather than static interpretation of the term "acquired" as used in subdivision (b)(1) will best serve to prevent inequity. Acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Subsection (k) did not create substantive rights in any party to particular marital property which that party argues comes within the meaning of acquired during the course of the marriage. Wilson v. Wilson, — N.C. App. —, 325 S.E.2d 668 (1985).

Entireties Property Presumed to Be Gift to Marital Estate. — A presumption of gift to the marital estate of entireties property is consistent with a public policy to further the intent of both parties as evidenced by their mutual agreement. When one party titles property jointly it is reasonable that the other party expects it to be an addition to marital property. To protect those expectations the property should be classified as marital unless the donor's contrary intent was clearly brought to the attention of the donee. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Presumption May Be Overcome by Clear, Cogent, and Convincing Evidence. — Under common law, a deed conveying real estate to a husband and wife creates an estate by the entireties.

However, title is not absolutely controlling under the Equitable Distribution Act. Joint title merely creates the rebuttable presumption of marital property, which may be overcome by clear, cogent, and convincing evidence of the third party donor's contrary intent. Thus, evidence that the gift of property was intended for only one spouse could conceivably rebut the presumption. Admittedly, the likelihood of overcoming the presumption is small. Loeb v. Loeb, — N.C. App. —, 324 S.E.2d 33 (1985).

When property titled by the entireties is acquired in exchange for separate property the conveyance itself indicates the "contrary intention" to preserving separate property required by the statute. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Proof Required to Overcome Marital Property Presumption. — The Equitable Distribution Act creates a presumption that all property acquired by the parties during the course of the marriage is marital property. Absent a statutorily-mandated standard of proof, the court adopts the standard of proof required to rebut a presumption of gift between spouses in cases involving title to real property arising prior to the effective date of the act. The marital property presumption may, therefore, be rebutted by clear, cogent, and convincing evidence that the property comes within the separate property definition. The burden of proof necessarily falls on the party claiming the separate property. Loeb v. Loeb, — N.C. App. —, 324 S.E.2d 33 (1985).

Insurance proceeds intended as exclusive recompense for a spouse's lost wages and medical expenses are part of the marital estate subject to distribution. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

Separate property is not subject to equitable distribution. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Separate property brought into the marriage or acquired by a spouse during the marriage must be returned to that spouse, if possible, upon dissolution of the marriage. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Cash Gift from Third Party. — Absent proof of the value, a cash gift from a third party cannot initially qualify as separate property and be traced into a joint bank account. Loeb v. Loeb, — N.C. App. —, 324 S.E.2d 33 (1985).

Passive Appreciation in Separate Property's Value Is Separate Property. — Subdivision (b)(2) of this section, which classifies increase in value of separate property as separate property, refers only to increase due to passive appreciation, which does not deplete the marital estate. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

But Active Appreciation in Separate Property's Value Is Marital Property. — An inherited interest in a closely-held corporation qualifies as separate property under the statute. Any increase in its value due to active appreciation is marital property. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. Thus the marital partnership shares in increases in value of property it has proportionately "acquired" in its own right. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Findings Ordered to Determine Portion of Spouse's Inheritance Constituting Marital Property. — In order to determine what part of a spouse's inherited interest in a corporation constituted marital property, the trial court was ordered to make findings as to: (1) the value of plaintiff's minority interest at the time of inheritance; (2) the value of plaintiff's controlling interest at the date of separation; (3) the difference between the two; and (4) the proportion of that difference that were due to active appreciation, i.e., attributable to funds, talent, or labor that were assets of the marital community. The resulting amount was marital property subject to equitable distribution. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

North Carolina recognizes dual nature of property acquired with both marital and separate assets. This approach has generally been referred to as the source of funds theory. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

"Source of Funds" Rule as to When Property Is Acquired. — The Court of Appeals has adopted the source of funds rule, by which property is "acquired" as it is paid for, so that it may include both marital and separate ownership interests. Under the source of funds rule acquisition is an ongoing process. It does not depend upon inception

of title but upon monetary or other contributions made by one or both of the parties. McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Under the source of the funds theory, when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. Thus, both the separate and marital estates receive a proportionate and fair return on its investment. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Pension and Retirement Rights. — Where an action for divorce is filed before 1 August 1983, all pension and retirement rights are considered separate property for purposes of equitable distribution. Where a divorce action is filed on or after 1 August 1983, vested pension and retirement rights are considered marital property, and the expectation of nonvested rights are considered separate property. Johnson v. Johnson, — N.C. App. —, 328 S.E.2d 876 (1985).

Deed of Trust Executed without Wife's Consent Attached to Husband's Interest. — When defendants were divorced, the tenancy by the entirety in which their marital home was held became a tenancy in common, and the lien of deed of trust executed by husband without wife's consent attached to defendant husband's one-half undivided interest in the property. Thus when the marital home was distributed pursuant to this section defendant wife took title in fee simple absolute subject to plaintiff bank's deed of trust on defendant husband's one-half undivided interest. Branch Banking & Trust Co. v. Wright, — N.C. App. —, 328 S.E.2d 840 (1985).

Authority to Order Conveyance of Title. — Courts have within their powers in equity the authority to compel one person to convey title to property to another person when justice requires it as is best demonstrated by courts' use of the equitable remedy of constructive trust. As is indicated by subsection (g), the legislature recognized this power of the courts to order the transfer of real property under appropriate circumstances. Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985).

Fault or Misconduct. — Fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

The policy behind this section is basically one of repayment of contribution. It would be inconsistent with this policy to hold that courts may consider fault in making such distributions. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

It is clear that the Legislature intended fault to be a consideration in awarding alimony. No such intent is evident from this section, nor is fault appropriate in determining what is an equitable settlement and division of property between the parties. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

It was not the intent of the Legislature to give courts the inherently arbitrary power to place a monetary value on the misconduct of a spouse in dividing property. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984); Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984) cert. granted, — N.C. —, 326 S.E.2d 33 (1985).

The only justification for allowing courts to consider fault in dividing marital property is to permit them to use their power to punish the "guilty" spouse. This is not what the Legislature intended. The statute must not be considered a penalty statute. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

In enacting the equitable distribution statutes, this section and § 50-21, the General Assembly failed to specify whether fault or misconduct is an appropriate factor to be weighed in making the distribution. The North Carolina Court of Appeals has held, however, that the position most consistent with the policy and purpose of the statutes is that fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property. Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), cert. granted, — N.C. —, 326 S.E.2d 33 (1985).

Court Has Broad Discretion. —

The legislature clearly intended to vest trial courts with discretion in distributing marital property under this section but guided always by the public policy expressed therein favoring an equal division. The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catchall factor codified in subdivision (c)(12). White v. White —, N.C. —, 324 S.E.2d 829 (1985).

As to the proper standard of review of equitable distribution awards where evidence was admitted

tending to show that an equal distribution would not be equitable, see White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Findings Not Disturbed on Appeal Absent Abuse of Discretion. — The trial court's findings in support of an equitable but unequal division will not be disturbed on appeal unless there was a clear abuse of discretion. Weaver v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985).

Applied in Crumbley v. Crumbley, 70 N.C. App. 143, 318 S.E.2d 525 (1984); Brown v. Brown, — N.C. App. —, 324 S.E.2d 287 (1985); Phillips v. Phillips, — N.C. App. —, 326 S.E.2d 57 (1985); Dusenberry v. Dusenberry, — N.C. App. —, 326 S.E.2d 65 (1985).

Cited in Cator v. Cator, 70 N.C. App. 719, 321 S.E.2d 36 (1984); Williams v. Williams, — N.C. App. —, 323 S.E.2d 463 (1984); Blount v. Blount, — N.C. App. —, 323 S.E.2d 738 (1984).

§ 50-21. Procedures in actions for equitable distribution of property.

(b) If the divorce is granted on the ground of one year separation, the marital property shall be valued as of the date of separation as determined under G.S. 50-6. If the divorce is granted on any ground listed in G.S. 50-5.1, the marital property shall be valued as of the date the divorce action is filed or as of the date of last separation, whichever date is earlier. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective July 11, 1985, substituted "G.S. 50-5.1" for "G.S. 50-5" in the second sentence of subsection (b).

CASE NOTES

Public Policy of this State, etc. — Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support has not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it. Capps v. Capps, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

It is North Carolina's public policy that an equitable distribution of property shall follow a decree of absolute divorce (§ 50-21(a)). However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in § 50-20(d). Case v. Case, — N.C. App. —, 325 S.E.2d 661 (1985).

Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship. White v. White, — N.C. —, 324 S.E.2d 829 (1985).

Marital Property Value at Net Value. — Net value, rather than fair market value, is the proper measure for valuing marital property for equitable distribution. Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985).

Entireties Property Becomes Tenancy in Common between Divorce and Distribution. — Under subsection (a) of this section, which states that "equitable distribution of property shall follow a decree of absolute divorce", the estate of a tenancy in common of necessity intervenes between absolute divorce and an award of title pursuant to equitable distribution when property was held by the entireties. This is so whether or not the divorce and the equitable distribution occur in a single proceeding. Branch Banking & Trust Co. v. Wright, — N.C. App. —, 328 S.E.2d 840 (1985).

Deed of Trust Executed without

Wife's Consent Attached to Husband's Interest. — When defendants were divorced the tenancy by the entirety in which their marital home was held became a tenancy in common, and the lien of deed of trust executed by husband without wife's consent attached to defendant husband's one-half undivided interest in the property. Thus when the marital home was distributed pursuant to § 50-20 defendant wife took title in fee simple absolute subject to plaintiff bank's deed of trust on defendant husband's one-half undivided interest. Branch Banking & Trust Co. v. Wright, — N.C. App. —, 328 S.E.2d 840 (1985).

Applied in Crumbley v. Crumbley, 70 N.C. App. 143, 318 S.E.2d 525 (1984); Lofton v. Lofton, 71 N.C. App. 635, 322 S.E.2d 654 (1984); Weaver v. Weaver, — N.C. App. —, 324 S.E.2d 915 (1985); Dusenberry v. Dusenberry, — N.C. App. —, 326 S.E.2d 65 (1985).

Cited in Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984).

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

The question of subject matter jurisdiction may be raised at any point in a proceeding under the Uniform Child Custody Jurisdiction Act, and such jurisdiction cannot be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district courts of this State possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore, the real question under the Uniform Child Custody Jurisdiction Act is whether jurisdiction is properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Cited in Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984).

§ 50A-2. Definitions.

CASE NOTES

Applied in Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

§ 50A-3. Jurisdiction.

CASE NOTES

Personal jurisdiction over the nonresident parent is not a requirement under this Chapter. Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

Ex Parte Order for Temporary Custody. — Once the trial court has gained jurisdiction by establishing one of the bases for jurisdiction listed in subsection (a), it may enter an ex parte order for temporary custody prior to service of process or notice, if the circumstances of the case render it appropriate. Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

Finding that the husband "is on active duty with the United States Marine Corps and is stationed at Camp Lejeune, North Carolina" is sufficient to satisfy the home state rule requirement that a parent or person acting as parent continues to live this State. Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Applied in Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

§ 50A-7. Inconvenient forum.

CASE NOTES

Applied in Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

§ 50A-25. Emergency orders.

Nothing in this Chapter shall be interpreted to limit the authority of the court to issue an interlocutory order under the provisions of G.S. 50-13.5(d)(2); or a secure or nonsecure custody order under the provisions of G.S. 7A-573. (1979, c. 110, s. 1; 1985, c. 689, s. 22.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "or a secure or nonsecure custody order under the provisions of G.S. 7A-573" for "or an immediate custody order under the provisions of G.S. 7A-284" at the end of the section.

Chapter 50B.

Domestic Violence.

§ 50B-1. Domestic violence; definition.

Domestic violence means the occurrence of one or more of the following acts between past or present spouses or between persons of the opposite sex who are living together or have lived together as if married, or between one of such persons and a minor child who is in the custody of or residing with the other person:

(1979, c. 561, s. 1; 1985, c. 113, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added "or between one of such persons and a minor child who is in the custody of or residing with the other person" at the end of the introductory language.

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders.

(a) A person residing in this State may seek relief under this Chapter by filing a civil action alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter.

(b) A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing shall be held within 10 days of the filing of the motion.

(1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote the first sentence of subsection (a), which formerly read: "A party residing in this State may seek relief under this Chapter by filing a civil action alleging acts of domestic violence," and added "or a minor child" at the end of the first sentence of subsection (b).

§ 50B-3. Relief.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides. (1979, c. 561, s. 1; 1985, c. 463.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective June 24, 1985, rewrote the last sentence of subsection (c), which formerly read: "If the victim does not reside in a city, or resides in a city with no police department, the copy shall be issued to and retained by the sheriff of the county in which the victim resides."

§ 50B-4. Enforcement of orders.

(b) A law-enforcement officer shall arrest and take a person into custody if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim, and if the victim, or someone acting on the victim's behalf, presents the law-enforcement officer with a copy of the order or the officer determines that such an order exists through phone, radio or other communication with appropriate authorities. The person arrested shall be brought before the appropriate district court judge at the earliest time possible to show cause why he or she should not be held in civil contempt for violation of the order. The person arrested shall be entitled to be released under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1979, c. 561, s. 1; 1985, c. 113, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, inserted "or someone acting on the victim's behalf" in the first sentence of subsection (b).

§ 50B-5. Emergency assistance.

(a) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law-enforcement agency. The local law-enforcement agency shall respond to the request for assistance as soon as practicable; provided, however, a local law-enforcement agency shall not be required to respond in instances of multiple complaints from the same complainant if the multiple complaints are made within a 48-hour period and the local law-enforcement agency has reasonable cause to believe that immediate assistance is not needed. The local law-enforcement officer responding to the request for assistance is authorized to take whatever steps are reasonably necessary to protect the complainant from harm and is authorized to advise the complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law-enforcement officer is authorized to transport the complainant to appropriate facilities such as hospitals, magistrates' offices, or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(1979, c. 561, s. 1; 1985, c. 113, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, inserted "or a minor child" in the first sentence of subsection (a).

§ 50B-6. Construction of Chapter.

This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein. This Chapter shall not be construed as relieving any person or institution of the duty to report to the department of social services, as required by G.S. 7A-543, if the person or institution has cause to suspect that a juvenile is abused or neglected. (1979, c. 561, s. 1; 1985, c. 113, s. 6.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added the second sentence.

Chapter 51.
Marriage.

Article 1.
General Provisions.

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where the marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, — N.C. App. —, 326 S.E.2d 354 (1985).

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, added the sentence at the end of subsection (a).

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Applied in Heiser v. Heiser, — N.C. App. —, 321 S.E.2d 479 (1984).

Article 2.

Marriage Licenses.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

§ 51-13. Penalty for violation of §§ 51-9 to 51-12.

Any violation of G.S. 51-9 to 51-12, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars ($50.00) or imprisonment for 30 days, or both. (1939, c. 314, s. 3; 1985, c. 689, s. 23.)

Editor's Note. — Section 51-12, referred to in this section, is repealed, effective Jan. 1, 1986, by Session Laws 1985, c. 589, s. 27.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "51-12" for "51-13" in the catchline and substituted "51-12" for "51-14" near the beginning of the section.

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Same rules which govern interpretation of contracts generally apply to separation agreements. Blount v. Blount, — N.C. App. —, 323 S.E.2d 738 (1984).

Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. Blount v. Blount, — N.C. App. —, 323 S.E.2d 738 (1984).

Release and Quitclaim of Property Rights. — This section allows husband and wife to enter a separation agreement which releases and quitclaims any property rights acquired by marriage, and that a release will bar any later claim on the released property. Such a valid separation agreement is an enforceable contract between husband and wife. Blount v. Blount, — N.C. App. —, 323 S.E.2d 738 (1984).

Prior Agreement as Bar to Equitable Distribution. — When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution. Blount v. Blount, — N.C. App. —, 323 S.E.2d 738 (1984).

Applied in McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

§ 52-10.1. Separation agreements.

CASE NOTES

The law in North Carolina strongly favors enforcing contracts as written, wherever they may be entered into. Policy does not favor allowing spouses to escape their lawful support obligations simply by crossing state lines. White v. Graham, — N.C. App. —, 325 S.E.2d 497 (1985).

Applied in White v. Graham, — N.C. App. —, 325 S.E.2d 497 (1985); McLeod v. McLeod, — N.C. App. —, 327 S.E.2d 910 (1985).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

Sec.
52A-10.3. Official to represent plaintiff; initiating.

§ 52A-1. Short title.

CASE NOTES

Applied in White v. Graham, — N.C. App. —, 325 S.E.2d 497 (1985).

Cited in Miller v. Kite, — N.C. —, 329 S.E.2d 663 (1985).

§ 52A-10.3. Official to represent plaintiff; initiating.

If this State is acting as an initiating state the prosecuting attorney upon the request of the court (in the case of a person or member of a family receiving public assistance, at the request to the court by the county director of social services) shall represent the plaintiff in any proceeding under this Chapter. The county director of social services in making such a request will provide written verification of the indigency of the person and the fact that the person or the family is receiving public assistance. In counties where the services of a special county attorney are available for social services matters as set out in G.S. 108A-16 through 108A-18, such special county attorney, instead of the prosecuting attorney, shall represent the obligee, the county or the plaintiff in any proceeding under this Chapter when the county has a right to invoke the provisions of this Chapter under G.S. 52A-8.1. (1975, c. 656, s. 1; 1985, c. 689, s. 24.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 108A-16 through 108A-18" for "G.S. 108-20 through 108-22" in the third sentence.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1985

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1985 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG
Attorney General of North Carolina